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### Companion Animals Are More than "Just" Personal Property: Oregon Supreme Court Joins Growing National Trend

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# COMPANION ANIMALS ARE MORE THAN “JUST” PERSONAL PROPERTY: OREGON SUPREME COURT JOINS GROWING NATIONAL TREND

*Kathleen Simers\**

## I. INTRODUCTION

Several states have joined a growing trend of changing the traditional legal view of animals, specifically domestic pets, from “mere property”<sup>1</sup> to “living beings”<sup>2</sup> because they “occupy a unique position in people’s hearts and in the law.”<sup>3</sup>

On June 16, 2016, the Oregon Supreme Court held in *State v. Newcomb*<sup>4</sup> that where a dog is lawfully seized based on probable cause of neglect, the owner does not have a protected privacy interest in the pet’s blood under either the Oregon Constitution or the United States Constitution.<sup>5</sup> Despite having strong opinions on the matter, the court narrowed its holding to circumstances where the animal had not only been lawfully seized by the State based on probable cause of either neglect or abuse, but also confined it to the performance of “medically

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1. See OR. REV. STAT. § 609.020 (2009).
2. *State v. Newcomb*, 375 P.3d 434, 439 (Or. 2016).
3. *State v. Fessenden*, 333 P.3d 278, 284 (Or. 2014).
4. 375 P.3d 434 (Or. 2016).
5. *Id.* at 436.

appropriate procedure[s] for diagnosis and treatment of animals in ill-health.”<sup>6</sup>

The decision draws a line between constitutional protections for different types of personal property, stating that, “not all things that can be owned and possessed as personal property merit the same constitutional protection.”<sup>7</sup> For instance, a person may not treat his or her dog the same way a person treats his or her suitcase.<sup>8</sup> Oregon statutes require “minimum care”<sup>9</sup> of domestic pets, and if these obligations are not met, an “owner has no cognizable right, in the name of [] privacy, to countermand that obligation.”<sup>10</sup> With these ideas in mind, the court recognized the position of animals in the law as above that of “inanimate property.”<sup>11</sup>

As this Comment will address, the decision is consistent with previous Oregon cases as well as recent decisions in select other states, all of which are joining the trend toward more protection for animals.<sup>12</sup> Part II discusses the factual and procedural history of *Newcomb*. Part III looks at the reasoning of the court and its conclusion. Part IV builds the historical framework, and finally, Part V ties together the historical framework and examines a small sample of states that are also making legislative and judicial decisions that support the social norms and growing trends described by the *Newcomb* court.

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6. *Id.* at 444.

7. *Id.* at 440.

8. *See generally id.* at 440 (discussing the existing Oregon precedent regarding searches of containers and insentient beings); *cf. id.* at 440–41 (distinguishing sentient beings from the objects discussed in *State v. Owens*, 729 P.2d 524 (1986)).

9. *See, e.g.,* OR. REV. STAT. § 167.310(9) (2017).

10. *Newcomb*, 375 P.3d at 443 (emphasis omitted).

11. *Id.* at 441.

12. *See* ALASKA STAT. § 25.24.160(a)(5) (2017) (guiding court decisions in divorce cases by basing custody on the best interests of the animal); OR. REV. STAT. § 167.305(2); *State v. Fessenden*, 333 P.3d 278, 286 (Or. 2014); *cf. Christopher Sean Krimmer, Following Alaska’s Lead: A Wisconsin Pet Custody Statute*, WIS. LAW. (Apr. 2017), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=90&Issue=4&ArticleID=25533> (suggesting a Wisconsin pet custody statute closely modeled on Alaska’s law); *California Court of Appeals Says Pets Are More than Inanimate Property*, ALL-CREATURES.ORG (Oct. 2012), <https://www.all-creatures.org/articles/ar-california-court.html> (discussing the California Second District Court of Appeals ruling that allows for reasonable recovery of necessary costs for wrongfully injured animals); “*Goddard’s Law*” *Passes Ohio House*, OHIO HOUSE OF REPRESENTATIVES (June 25, 2015), <http://www.ohiohouse.gov/stephen-d-hambley/press/goddards-law-passes-ohio-house> (discussing now-enacted “Goddard’s Law,” which elevates penalties for animal abuse to felonies).

## II. STATEMENT OF THE CASE

Special Agent Austin Wallace (“Wallace”) was an animal cruelty investigator and certified police officer when he received a citizen’s report that the defendant, Amanda Newcomb (“Newcomb”), was neglecting her dog, Juno.<sup>13</sup> Newcomb was twenty-eight years old at the time and was self-employed, ironically enough, as a dog sitter.<sup>14</sup> The report provided that Newcomb allegedly locked Juno in a kennel for long periods of time, starved him, and beat him.<sup>15</sup> Based on this report, Wallace went to Newcomb’s home to speak with her.<sup>16</sup> During the conversation, Juno remained outside, but visible to the officer through a sliding glass door.<sup>17</sup> Wallace observed Juno, in a “near-emaciated condition,” attempting to eat items in the yard and dry heaving, all with no visible fat on his body.<sup>18</sup> In his experience, Wallace had observed hundreds of animals in similar conditions, and asked Newcomb why Juno was so thin.<sup>19</sup> Newcomb admitted to Wallace she had “run out” of Juno’s food, and stated she “was planning on buying food that evening.”<sup>20</sup>

Based on all the circumstances and factors such as his visual observations, the citizen’s report, and Newcomb’s statements during questioning, Wallace determined he had probable cause of Newcomb’s neglect.<sup>21</sup> Wallace offered to take Juno for medical treatment but Newcomb declined the assistance, stating that her dog “looked healthy.”<sup>22</sup> Wallace felt it was likely Juno needed medical attention and therefore took Juno, over Newcomb’s objections, to Dr. Zarah Hedge of the Oregon Humane Society.<sup>23</sup>

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13. *Newcomb*, 375 P.3d at 436.

14. See Merritt Clifton, *Stepping in Poop Without a Warrant: Oregon Supreme Court Rules*, ANIMALS 24-7 (June 21, 2016), <https://www.animals24-7.org/2016/06/21/stepping-in-poop-without-a-warrant-oregon-supreme-court-rules/>; see Aimee Green, *Pets Not ‘Mere’ Property: Oregon Supreme Court Upholds Dog-Starvation Conviction*, OREGONLIVE (June 16, 2016), [https://www.oregonlive.com/portland/2016/06/pets\\_arent\\_just\\_property\\_orego.html](https://www.oregonlive.com/portland/2016/06/pets_arent_just_property_orego.html).

15. See Green, *supra* note 14.

16. *Newcomb*, 375 P.3d at 436.

17. *Id.*

18. *Id.* at 436; see also SAUNDERS COMPREHENSIVE VETERINARY DICTIONARY 365 (Virginia P Studdert et al. eds., 4th ed. 2012) (defining “emaciation” as “excessive leanness; a wasted condition of the body; generally taken to mean that the body weight is less than 50 percent of the normal expected for a comparable normal animal.”).

19. *Newcomb*, 375 P.3d at 436–37; Green, *supra* note 14.

20. *Newcomb*, 375 P.3d at 437.

21. *Id.*

22. *Id.*

23. *Id.*

Dr. Hedge examined Juno and using a body condition score test,<sup>24</sup> placed Juno at a 1.5.<sup>25</sup> Veterinarians base this decision on various factors, such as “whether the dog’s ribs and spine are visibly protruding (meaning that the dog is emaciated); or, on the opposite end of the scale, whether the veterinarian must actually touch the dog to be able to locate its ribs and spine (meaning that the dog is obese).”<sup>26</sup>

In order to rule out any internal conditions or reasons that could have caused Juno’s malnourished state, Dr. Hedge drew a blood sample for testing.<sup>27</sup> Because the tests revealed no parasites nor any other medical conditions, Dr. Hedge determined Juno’s condition was a result of neglect and malnourishment.<sup>28</sup> Given this information, Newcomb received a citation for second-degree animal neglect, a Class B Misdemeanor.<sup>29</sup>

Before the case proceeded to trial, Newcomb argued a motion to suppress the blood test results based on several different arguments.<sup>30</sup> First, Newcomb argued Wallace did not have probable cause of neglect to take Juno for treatment, making the seizure unlawful.<sup>31</sup> Second, she argued the blood draw performed by Dr. Hedge constituted an unreasonable and warrantless search of her personal property.<sup>32</sup> In so doing, she analogized Juno to other tangible personal property such as folders, stereos, vehicles, or boots.<sup>33</sup> Newcomb urged the court that even if it found Wallace had lawfully seized Juno, the State could only examine the outside of the dog without a warrant.<sup>34</sup> Relying in part on the “knowingly exposed” doctrine of the Fourth

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24. See generally Kimberly Baldwin et al., *Nutritional Assessment Guidelines for Dogs and Cats*, 46 J. AM. ANIMAL HOSP. ASS’N 285, 287 (2010) (explaining the body condition score test).

25. *Newcomb*, 375 P.3d at 437. When veterinarians use the body condition score test, they are looking for the ideal, healthy body condition score of a dog, which is a four to five. The scale ranges “from one—meaning emaciated—to nine—meaning obese.” *Id.*

26. *Id.*; see generally *Body Condition Scoring (BCS) Systems*, J. AM. ANIMAL HOSP. ASS’N (2010), [https://www.aaha.org/globalassets/02-guidelines/weight-management/weightmgmt\\_bodyconditionscoring.pdf](https://www.aaha.org/globalassets/02-guidelines/weight-management/weightmgmt_bodyconditionscoring.pdf) (providing a graphical representation of body condition scoring systems).

27. *Newcomb*, 375 P.3d at 437.

28. *Id.*

29. OR. REV. STAT. § 167.325(2) (2017) (providing that a person is guilty under this statute where the requisite mental state is present and where an animal is in their possession or control and they neglect an animal by failing to provide minimum care, or by tethering the animal, causing physical injury); *Newcomb*, 375 P.3d at 437.

30. *Newcomb*, 375 P.3d at 437.

31. *Id.*

32. *Id.*

33. *Id.* at 437–38.

34. *Id.* at 438.

Amendment analysis, she argued the interior of Juno was her personal property that she did not intend to display to the public, which she kept from public view, making it private.<sup>35</sup>

In opposition, the prosecution argued Wallace had probable cause regarding neglect, making his seizure of the dog for medical treatment lawful and reasonable.<sup>36</sup> While the prosecution conceded that a dog is personal property under current Oregon law, they argued Juno could not be analogized to an “opaque container” in regards to privacy interests because dogs only typically contain “more dog.”<sup>37</sup> Therefore, the drawing of blood could not have revealed anything that Newcomb could expect to be kept as private.<sup>38</sup>

Interestingly, Dr. Hedge was not asked to testify at the suppression hearing.<sup>39</sup> Instead, the parties stipulated that the tests and results of the tests indicated Juno’s malnourishment.<sup>40</sup> The court denied Newcomb’s arguments and motion to suppress, concluding that the seizure of Juno by the officer was based on probable cause and therefore lawful.<sup>41</sup> Thus, no warrant was required in order to “medically test Juno’s blood.”<sup>42</sup>

At trial, Newcomb was convicted of the second-degree animal neglect charge, which she subsequently appealed.<sup>43</sup> Both parties asserted similar arguments on appeal to those previously made before the trial court.<sup>44</sup> In its opinion, the appellate court reversed and remanded the trial court decision, holding that although Wallace had probable cause to seize Juno, the blood draw was a “physical intrusion into defendant’s property” and “the testing of blood ‘revealed evidence that was not otherwise exposed to public view’ or to those who had lawful access to the dog while it was in the state’s custody.”<sup>45</sup>

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35. *See id.*

36. *Id.*

37. *Id.*

38. *Id.*; *see also* Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (describing the test for a person’s constitutional reasonable expectation of privacy in personal property).

39. *Newcomb*, 375 P.3d at 437 n.4.

40. *Id.*

41. *Id.* at 438.

42. *Id.*

43. *State v. Newcomb*, 324 P.3d 557, 559 (Or. Ct. App. 2014).

44. *Id.* at 561.

45. *Id.* at 565–66 (quoting *State v. Dickerson*, 898 P.2d 193, 195 (Or. Ct. App. 1995)).

The search did not fall within any viable warrant exception and it therefore was deemed unlawful.<sup>46</sup>

The State petitioned for review, and the Supreme Court of Oregon focused on one issue: whether there was a protected privacy interest in Juno's blood.<sup>47</sup> If found to be a search, the parties disputed the reasonableness of the blood draw without a warrant or a warrant exception.<sup>48</sup> In an opinion drafted by Justice Linder for the eight participating justices, the Supreme Court of Oregon reversed and held the blood draw was not a search and reinstated the trial court decision.<sup>49</sup>

### III. REASONING OF THE *NEWCOMB* COURT

The Oregon Supreme Court broke its analysis into two portions.<sup>50</sup> The first portion considered whether the blood draw was a search under Article I, section 9 of the Oregon Constitution, and the second portion under the Fourth Amendment of the United States Constitution.<sup>51</sup> The court adhered to a "first-things-first"<sup>52</sup> approach in reviewing both claims, stating it need not evaluate the Fourth Amendment claim unless it first concluded no state violation occurred.<sup>53</sup> Relying on precedent case *State v. Bailey*,<sup>54</sup> the court proceeded under a standard of review viewing the facts "in the light most favorable to the trial court's denial of the motion to suppress."<sup>55</sup>

#### A. *Whether a Dog Owner Has a Protected Privacy Interest in the Dog's Blood Under Oregon Constitution Article I, Section 9*

Article I, section 9 of the Oregon Constitution states: "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure."<sup>56</sup> To define terms such as "search," seizure," and "interests" under this

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46. *Id.* at 567.

47. *Newcomb*, 375 P.3d at 438–39 (reaching the Supreme Court of Oregon, *Newcomb* conceded the issue of Juno's lawful seizure).

48. *Id.* at 439.

49. *Id.* at 446.

50. *Id.* at 439–46.

51. *Id.*

52. *See Sterling v. Cupp*, 625 P.2d 123, 126 (Or. 1981) (en banc).

53. *Newcomb*, 375 P.3d at 439.

54. 338 P.3d 702, 704 (Or. 2014).

55. *Newcomb*, 375 P.3d at 436.

56. OR. CONST. art. I, § 9.

section, the court looked to precedent cases.<sup>57</sup> A “search” does not “occur[] unless the police invade a protected privacy interest.”<sup>58</sup> *State v. Owens*<sup>59</sup> provides that a “seizure” occurs only where a governmental action significantly interferes “with a person’s possessory or ownership interests in property.”<sup>60</sup> In *Newcomb*, both privacy and ownership or possession interests were in question, with possessory rights having an impact on a protected property interest.<sup>61</sup> Finally, the *Newcomb* court summarized the precedent set in *State v. Campbell*<sup>62</sup> that the protected interest “is not the privacy to which [a person] expects, but the privacy to which one has a right.”<sup>63</sup>

Courts often address the legality of an examination of an item, or search, after a warrantless seizure, commonly relating to searches of inanimate objects like stereos or folders; however, Juno is a living creature.<sup>64</sup> The outcome of the legal analysis turns on the importance the court places on this one fact.<sup>65</sup>

Following the reasoning of her previous arguments, *Newcomb* argued Juno was “personal property,” which she contended should be analogous to a “closed opaque container, one that did not announce its contents.”<sup>66</sup> Under this analysis, *Newcomb* argued the blood draw constituted a search, which would have required Wallace to first obtain a warrant.<sup>67</sup> Further, *Newcomb* argued, after a lawful seizure of an object such as a stereo or folder, the state may “thoroughly examine the exterior,” but that any investigation of the interior is “another matter.”<sup>68</sup> Without a warrant, the state may only “observe, feel, smell, shake, and weigh” the item and make any reasonable observations that are in plain view.<sup>69</sup> Had the court adopted the approach that Juno was

57. *Newcomb*, 375 P.3d at 439.

58. *State v. Wacker*, 856 P.2d 1029, 1034 (Or. 1993). Defendant Wacker attempted to suppress evidence of a controlled substance, which officers collected pursuant to a search of a vehicle in which Wacker was a passenger. *See id.* at 1031–32. The Supreme Court of Oregon held no search occurred because police had not invaded Wacker’s protected privacy interest. *See id.* at 1036.

59. 729 P.2d 524 (Or. 1986).

60. *Id.* at 531.

61. *Newcomb*, 375 P.3d at 439; *see also State v. Howard*, 157 P.3d 1189, 1193 (Or. 2007).

62. 759 P.2d 1040, 1044 (Or. 1988).

63. *Newcomb*, 375 P.3d at 439 (quoting *Campbell*, 759 P.2d at 1044).

64. *Id.* at 439.

65. *See id.* at 439, 441–42.

66. *Id.* at 440; OR. REV. STAT. § 609.020 (2009) (“Dogs are hereby declared to be personal property.”).

67. *Newcomb*, 375 P.3d at 440.

68. *Id.*; *State v. Owens*, 729 P.2d 524, 530 (Or. 1986).

69. *Newcomb*, 375 P.3d at 439–40; *State v. Heckathorne*, 223 P.3d 1034, 1040–41 (Or. 2009).



like any other inanimate piece of personal property, Newcomb would have succeeded on this claim.<sup>70</sup>

However, at this point, the court's analysis took a dramatic turn. The court referenced *State v. Owens*, which recognized under Article I, section 9 that not all containers are the same, nor do they all receive the same protection.<sup>71</sup> It further broadened this concept to all personal property.<sup>72</sup> Based on this precedent, the court's analysis turned first to the nature of the property involved in the case, meaning the nature of Juno as a living creature, and second, the circumstances surrounding the alleged intrusion of Newcomb's interests.<sup>73</sup>

### 1. The Nature of the Property Involved

In evaluating this first step of the analysis, the court relied on a set of cases, *State v. Dicke*<sup>74</sup> and *State v. Fessenden*,<sup>75</sup> later consolidated and referred to as *Fessenden/Dicke*. These cases challenged the ability of an officer to enter a property and seize an emaciated horse owned by the two codefendants.<sup>76</sup> After the seizure, the officer took the horse to a veterinarian's office because he believed there was probable cause the defendants were committing first-degree animal neglect.<sup>77</sup> The officer based probable cause on the following observations of the animal: there was no present fatty tissue, a protruding backbone, withers that stuck up, a thin neck, visibility of all the horse's ribs, the swaying of the animal on her feet, and that she was straining to urinate.<sup>78</sup> The officer feared due to the horse's poor condition, if he left and took time away to obtain a warrant the horse could fall, which many times would prove fatal.<sup>79</sup> Given the gravity of the circumstances, the court stated the existing exigent circumstances doctrine applied to animal neglect as a crime, but did not actually

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70. *Newcomb*, 375 P.3d. at 439–40.

71. *See Owens*, 729 P.2d at 530–31 (describing the nature and character of different containers such as transparent versus non-transparent containers and that some containers by nature announce their contents where others do not).

72. *Newcomb*, 375 P.3d. at 440.

73. *Id.*

74. 310 P.3d 1170 (Or. Ct. App. 2013).

75. 333 P.3d 278 (Or. 2014).

76. *Dicke*, 310 P.3d at 1170; *see Fessenden*, 333 P.3d at 278.

77. *Fessenden*, 333 P.3d at 279–80.

78. *Id.* at 280.

79. *Id.*

“expand” the doctrine.<sup>80</sup> Because the officer had probable cause and the horse needed immediate veterinary care, he did not need a warrant to seize the animal for treatment.<sup>81</sup>

The *Newcomb* court then evaluated the nature of animals under Oregon’s statutes that consider animals as “property.”<sup>82</sup> Apart from a few exceptions, the statutes allow ownership of animals by individuals, a point *Newcomb* relied upon in her defense.<sup>83</sup> However, *Newcomb* failed to address the impact of additional animal welfare statutes under Oregon law.<sup>84</sup> These welfare statutes provide unique and heightened protections for animals.<sup>85</sup> The court specifically noted that the Oregon protections are some of the highest in the country, requiring owners provide at least “minimum care” to their animals.<sup>86</sup>

Minimum care is “care sufficient to preserve the health and well-being of an animal,” including basic nutrition and “veterinary care [that a] reasonably prudent person [would deem necessary] to relieve distress from injury, neglect, or disease.”<sup>87</sup> The legislative purpose for creating such protections acknowledge legal and social norms that “animals are sentient beings capable of experiencing pain, stress, or fear.”<sup>88</sup> Bearing this and the nature of animals in mind versus other property, the court made a crucial statement that Oregon law prohibits people from treating their companion animals as they are free to treat other forms of insentient property, which created a higher burden of care for owners.<sup>89</sup>

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80. *Id.* at 286; see also *Exigent-Circumstances*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining one of many exceptions to the warrant requirement, typically where an officer may perform a search of property absent a warrant if a person’s life of safety is in danger).

81. *Fessenden*, 333 P.3d at 286.

82. OR. REV. STAT. § 609.020 (2009); *State v. Newcomb*, 375 P.3d 434, 440 (Or. 2016).

83. *Newcomb*, 375 P.3d at 440.

84. See OR. REV. STAT. §§ 167.325(2), 167.330 (2017) (describing the animal neglect statutes for first and second degree); OR. REV. STAT. § 167.310 (2017) (defining the terms related to the minimum care requirements); and OR. REV. STAT. § 167.305 (2017) (providing the legislative findings that animals are sentient beings that require minimum care to minimize pain, stress, fear, and suffering).

85. *Newcomb*, 375 P.3d at 440.

86. *Id.* at 441.

87. *Id.*; see also OR. REV. STAT. § 167.310.

88. OR. REV. STAT. § 167.305(1).

89. *Newcomb*, 375 P.3d at 441.

## 2. The Circumstances Surrounding the Government's Alleged Intrusion of Newcomb's Interests

Ultimately, the court concluded that, like the officer in *Fessenden/Dicke*, Wallace had reason to believe that Juno was malnourished, starving, and in need of immediate veterinary care.<sup>90</sup> Wallace based his beliefs on the citizen report of neglect, the owner's admission she did not have money to buy the dog's food, and the officer's own observations of Juno's behavior and physical appearance.<sup>91</sup> These visual observations were similar to the officer's observations in *Fessenden/Dicke*.<sup>92</sup> The officer in *Fessenden/Dicke* observed severe physical conditions of the horse's neck, ribs, and withers, and believed the neglect to be ongoing; the court held the animal may be seized without a warrant to prevent ongoing harm and for medical treatment.<sup>93</sup> Similarly here, Juno was near emaciated, dry heaving, and attempting to eat random items in the yard.<sup>94</sup> Critically, once in the State's lawful custody based on neglect, an owner loses (at least temporarily) the property right interests of dominion and control over the animal.<sup>95</sup> Therefore, in *Newcomb*, because the officer had probable cause to believe there was ongoing neglect, Newcomb at least temporarily lost her property rights in Juno.<sup>96</sup> The blood draw being necessary to diagnose the animal for treatment to prevent further harm made the search of Juno lawful.<sup>97</sup>

Tying together concepts of Oregon's statutes, legislative background and purpose, legal and social norms, and given the facts of the *Newcomb* case, the court concluded Juno was not an "opaque inanimate container."<sup>98</sup> Therefore, Newcomb did not have a protected privacy interest in Juno's "contents," like the blood that was drawn.<sup>99</sup> Though Newcomb argued that there was information in Juno that she had not knowingly exposed to the public, the court held this is not "information" in the sense that Newcomb had placed it inside Juno to

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90. *Id.* at 442.

91. *Id.* at 437.

92. *Id.* at 436–37.

93. *State v. Fessenden*, 333 P.3d 278, 279–80 (Or. 2014).

94. *Newcomb*, 375 P.3d at 436.

95. *Id.* at 443.

96. *Id.* at 442.

97. *Id.*

98. *Id.* at 442.

99. *Id.* at 442–43.

keep it out of view.<sup>100</sup> Consequently, the blood, organs, tissues, and bones were all part and product of “physiological processes” taking place inside Juno, and as such, were not items Newcomb could have placed for some kind of safekeeping.<sup>101</sup>

Ultimately, no violation of Newcomb’s rights occurred under Oregon Constitution Article I, section 9 because Juno had been legally seized based on probable cause of neglect and taken for medical diagnosis and treatment.<sup>102</sup> In a strong holding, the court emphasized that live animals are subject to statutory protection and that an owner has “no cognizable right, in the name of her privacy to countermand that obligation.”<sup>103</sup> The narrow holding is applicable only in situations where the animal has been seized lawfully, and then taken for medical diagnosis or treatment.<sup>104</sup>

*B. Whether a Dog Owner Has a Protected Privacy Interest in the Dog’s Blood Under the Fourth Amendment of the United States Constitution*

The court next turned to a brief analysis under the Fourth Amendment, which guarantees similar protections to the Oregon Constitution.<sup>105</sup> Comparably, the Fourth Amendment protects “the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.”<sup>106</sup> The term “search” is defined as an infringement of an individual’s protected privacy interest, and “seizure” as a “meaningful interference with a person’s possessory interest.”<sup>107</sup>

The analysis rests on a two-part test, as articulated by Justice Harlan’s concurrence in *Katz v. United States*.<sup>108</sup> To satisfy the first

100. *Id.* at 443 & n.13 (discussing the ability of animals to store information). This discussion is not applicable to the instant case, and therefore is outside the scope of this Comment. Interesting to note, the court makes mention of developing technology and microchipping techniques that may present a more pressing issue in the near future.

101. *Id.* at 443.

102. *Id.* at 446.

103. *Id.* at 443 (explaining that although the privacy test under the Oregon Constitution seems like a different analysis than the Fourth Amendment test, the two tests commonly lead to the same result).

104. *Id.* at 444 (suggesting that there is continuous development in understanding how all living things work together, and for that reason, the legal status of animals continues to change).

105. *Id.*

106. U.S. CONST. amend. IV; *Newcomb*, 375 P.3d at 444.

107. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Newcomb*, 375 P.3d at 439.

108. 389 U.S. 347, 361 (1967).

prong, Newcomb would have to display a subjective expectation of privacy to preserve the contents of Juno as private.<sup>109</sup> To fulfill the second prong, Newcomb would have to demonstrate that this expectation is objectively one which “society is prepared to recognize as reasonable.”<sup>110</sup>

The issue under the Fourth Amendment boiled down to the same question as under the Oregon Constitution: whether Newcomb had a protected privacy interest in Juno’s blood, which was withdrawn after a lawful seizure based on probable cause of neglect for the purposes of medical diagnosis and treatment.<sup>111</sup> Newcomb argued the property analysis under *Florida v. Jardines*<sup>112</sup> was controlling. In *Jardines*, officers used a drug-sniffing dog on the front porch and curtilage of Jardines’ property, which amounted to a search under the Fourth Amendment.<sup>113</sup> Newcomb argued the blood draw was a similar physical intrusion on her property as the drug-sniffing dog was in *Jardines*.<sup>114</sup> However, the court quickly dismissed the *Jardines* argument because it dealt with “physical invasions of property that the government had *not* lawfully seized.”<sup>115</sup> Because the court had already settled that Juno *had* been lawfully seized, it felt no need to explore this argument further.<sup>116</sup>

At the time of *Newcomb*, the United States Supreme Court had not yet heard a case regarding privacy interests in animals. However, the Oregon Supreme Court felt confident a United States Supreme Court decision would not differ much from its analysis under Article I, section 9.<sup>117</sup> The Oregon court began the property analysis under the Fourth Amendment by considering the “differing nature” of the property here, as a living animal and not a type of “closed opaque container” that would lead to an expectation of privacy.<sup>118</sup> The next consideration includes a necessary examination of the nature and circumstances of the government intrusion, as well as the general laws and social norms in regards to animal welfare, to determine what

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109. *Id.*; *Newcomb*, 375 P.3d at 444.

110. *Newcomb*, 375 P.3d at 444; *see Katz*, 389 U.S. at 361.

111. *Newcomb*, 375 P.3d at 445.

112. 569 U.S. 1 (2013).

113. *Id.* at 11–12.

114. *Newcomb*, 375 P.3d at 445 n.17.

115. *Id.* (emphasis added).

116. *Id.* at 446.

117. *Id.* at 445.

118. *Id.*

society is willing to recognize as a legitimate interest.<sup>119</sup> For all of the reasons previously mentioned, the court concluded the same: no violation under the Fourth Amendment occurred because the defendant had no protected privacy interest in Juno's blood.<sup>120</sup>

#### IV. HISTORICAL FRAMEWORK

##### *A. Protected Privacy Interests and Ownership/Possession*

The development of significant criminal procedure, property interests, and Fourth Amendment rights discussions in the United States dates back as far as 1886, in *Boyd v. United States*.<sup>121</sup> *Boyd* was a customs and revenue case based on the Fourth & Fifth Amendments.<sup>122</sup> The holding in *Boyd* discussed how a forced turnover of personal property such as invoices would implicate the Fourth Amendment as an unreasonable search and seizure, because *Boyd* retained the superior property interest in his documents.<sup>123</sup> A state's power to search and seize depends on who retains this superior interest. A state, under *Boyd*'s property analysis, can only search or seize if it is entitled to do so, for example, in the case of credit default.<sup>124</sup> *Boyd* is significant in *Newcomb* because it lays a foundational framework of the property analysis the *Newcomb* court maintained should have been extended to animals.<sup>125</sup>

The key progression of Fourth Amendment analysis began in the 1960s with the Cleveland case, *Mapp v. Ohio*.<sup>126</sup> In *Mapp*, the Supreme Court held the Fourth Amendment's exclusionary rule applied to both state and federal cases, giving the Fourth Amendment "teeth."<sup>127</sup> The exclusionary rule "excludes or suppresses evidence obtained in violation of an accused person's constitutional rights."<sup>128</sup> Created by the courts, the exclusionary rule acts as a remedy for the

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119. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 660 (1995); *Newcomb*, 375 P.3d at 445–46; see *Maryland v. King*, 569 U.S. 435, 463 (2013).

120. *Newcomb*, 375 P.3d at 446.

121. 116 U.S. 616 (1886).

122. *Id.* at 621.

123. *Id.* at 624.

124. *Id.*

125. See *Newcomb*, 375 P.3d at 445; see generally *Boyd*, 116 U.S. at 616 (1886) (providing in detail the earliest property analysis under the Fourth Amendment).

126. 367 U.S. 643 (1961).

127. RONALD JAY ALLEN, ET AL., CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL 321 (3d ed. 2016).

128. *Exclusionary Rule*, BLACK'S LAW DICTIONARY (10th ed. 2014).

defendant whose rights are violated, and acts to deter law enforcement from conducting searches and seizures that violate the Fourth Amendment.<sup>129</sup> *Mapp* is relevant to *Newcomb* because Newcomb was seeking to use this Fourth Amendment remedy of the exclusionary rule in her motion to suppress before trial.<sup>130</sup> If she had been successful, it would have barred the use of Juno's test results at trial, making a conviction less likely.

In 1966, shortly after *Mapp*, the United States Supreme Court decided *Schmerber v. California*,<sup>131</sup> where a police officer responding to a car accident had probable cause to believe the driver responsible for the accident was under the influence and subsequently forced him to submit to a blood test.<sup>132</sup> The Court held that a blood draw of a person falls within the scope of the Fourth Amendment, but is considered reasonable so long as the officer has probable cause, reasonable belief an emergency exists, and the procedure for the blood draw was medically reasonable.<sup>133</sup> In *Schmerber*, the emergency was such that in the time it would take to secure a warrant, the alcohol in the defendant's system could dissipate, destroying evidence before the completion of any testing.<sup>134</sup> This creates an exigency, and under the exigent circumstances in *Schmerber*, the officer did not have to obtain a warrant for the blood draw.<sup>135</sup> The exigent circumstances doctrine will sometimes "justify a warrantless search or seizure, esp[ecially] when there is probable cause to believe that evidence will be removed or destroyed before a warrant can be obtained."<sup>136</sup> It is a type of emergency, requiring "immediate action" on the part of the officer for any of the accepted reasons.<sup>137</sup> *Schmerber* is a relevant piece of the historical framework because it creates the exigent circumstances doctrine that the Oregon Supreme Court later applied in *Fessenden/Dicke*, as discussed in *Newcomb*.<sup>138</sup>

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129. *Exclusionary Rule*, LEGAL INFO. INST., CORNELL L. SCH., [https://www.law.cornell.edu/wex/exclusionary\\_rule](https://www.law.cornell.edu/wex/exclusionary_rule) (last updated June 2017).

130. See *Newcomb*, 375 P.3d at 437–38.

131. 384 U.S. 757 (1966).

132. *Id.* at 758.

133. *Id.* at 768–72.

134. *Id.* at 770.

135. *Id.* at 771.

136. *Exigent-Circumstances Doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014).

137. *Exigency*, BLACK'S LAW DICTIONARY (10th ed. 2014).

138. Compare *State v. Newcomb*, 375 P.3d 434, 440 (Or. 2016), with *State v. Fessenden*, 333 P.3d 278, 282 (Or. 2014), and *Schmerber*, 384 U.S. at 757 (explaining in *Schmerber* the exigent circumstances doctrine as applied in an analysis of the Fourth Amendment). While the court in

The *Newcomb* court relied on Justice Harlan's concurrence and two-prong test from *Katz*<sup>139</sup> as described in *United States v. Knotts*,<sup>140</sup> making the two cases historically significant here.<sup>141</sup> In *Knotts*, the government, with permission of the original owner, placed a beeper into a barrel of chemicals, which the defendant subsequently bought.<sup>142</sup> The beeper, along with visual surveillance, allowed the government to track the defendant to a cabin.<sup>143</sup> After several days of visual observation, the police were able to obtain a warrant to search the cabin, finding a fully developed drug lab inside.<sup>144</sup> The Court applied the two-prong *Katz* test, using both its objective and subjective components.<sup>145</sup> The first, subjective prong provides whether a person has manifested a subjective expectation to preserve something as private. The second, objective prong provides whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable."<sup>146</sup> The beeper did not invade any reasonable expectation of privacy, because *Knotts* had no expectation of privacy in the barrel nor in the movement of his car on public roads.<sup>147</sup> The Court subsequently held there was no Fourth Amendment violation.<sup>148</sup>

Finally, turning to the issue of opaque containers under the Fourth Amendment, the *Newcomb* court cited various United States Supreme Court cases, including *California v. Acevedo*<sup>149</sup> and *United States v. Ross*.<sup>150</sup> These cases discuss the following issue: when an individual puts information or items into a closed, opaque container, does he or she manifest an expectation of privacy in the contents of such

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*Fessenden* allowed for the exigent circumstances doctrine to be used, it was in a slightly different way than that illustrated in *Schmerber*. The *Fessenden* court allowed for its usage in the animal abuse case, and it was careful not to extend the doctrine.

139. *Katz v. United States*, 389 U.S. 347, 361 (1967).

140. 460 U.S. 276, 280–81 (1983).

141. See *Knotts*, 460 U.S. at 280–81; *Newcomb*, 375 P.3d at 444; see also *United States v. Jones*, 565 U.S. 400 (2012) (relying on analysis from *Knotts and Katz*).

142. *Knotts*, 460 U.S. at 278.

143. *Id.*

144. *Id.* at 279.

145. See *id.* at 280–81.

146. *Id.* at 281.

147. See *id.* at 282.

148. *Id.* at 285.

149. 500 U.S. 565 (1991).

150. 456 U.S. 798 (1982).



containers remaining hidden from the public?<sup>151</sup> Newcomb's defense relied in part on this argument; she argued that she had a subjective expectation of privacy in Juno's blood and an expectation for it to remain out of public view and examination.<sup>152</sup> However, Newcomb failed under the second prong because these expectations were not one society was ready to accept as reasonable under these specific circumstances.<sup>153</sup>

### B. Oregon Decisions Leading up to Newcomb

The *Newcomb* court relied on a few cases in establishing the interpretation and application of Article I, section 9.<sup>154</sup> The most notable is the predecessor to the *Newcomb* case, *Fessenden/Dicke*, as discussed *supra*.<sup>155</sup> The decision in that case upheld the ability of an officer to seize a horse for immediate medical care based on probable cause and under exigent circumstances.<sup>156</sup> The *Newcomb* court relied heavily on this case in its analysis as the issues were closely related.<sup>157</sup> *Newcomb* became next in a line of Oregon decisions over the last few years to increase protections for animals.<sup>158</sup>

## V. ANALYSIS

Given the rise of animal rights in recent decades and the historical framework of the Fourth Amendment, the Oregon Supreme Court correctly held that Juno's blood draw was not a search. Juno is not a mere container, but a living creature.<sup>159</sup> This distinction critically impacts the privacy interests of the owner in a criminal procedure context.<sup>160</sup> This follows the trend and social norms that place animals in a more elevated position under the law than other pieces of personal

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151. *Id.*; see generally *California v. Acevedo*, 500 U.S. 565 (1991) (describing in more detail the current and relevant law in relation to a person's expectation of privacy when she places information or items in closed opaque containers).

152. *State v. Newcomb*, 375 P.3d 434, 438 (Or. 2016).

153. *Id.* at 446.

154. *Id.* at 439.

155. *State v. Fessenden*, 333 P.3d 278 (Or. 2014).

156. *Id.* at 286.

157. See *State v. Newcomb*, 375 P.3d 434 (Or. 2016).

158. Green, *supra* note 14 (omitting the discussion of *State v. Nix*, 334 P.3d 437 (Or. 2014) which, while relevant to the discussion, the *Nix* decision was later vacated by the Oregon Supreme Court based on a lack of subject matter jurisdiction).

159. *Newcomb*, 375 P.3d at 442–43.

160. *Id.*

property.<sup>161</sup> It makes it easier for veterinarians to treat lawfully seized animals immediately for illness or injury without wasting potentially precious moments waiting on a warrant.<sup>162</sup> In so ruling, the court gave legal significance to the “sentient nature of animals,” which as previously noted, historically were regarded only as “mere property” under the law.<sup>163</sup>

Turning to the property analysis, the court first determined that under Oregon law, dogs are personal property, allowing them to be owned and possessed.<sup>164</sup> Under the Oregon animal welfare statutes, however, because the animal had been lawfully seized based on probable cause for neglect, the court determined that at the time of the blood draw that Newcomb had lost—at least temporarily—her property or possessory interest in Juno.<sup>165</sup> Drawing on and applying the other foundational consolidated case of *Fessenden/Dicke*, this emphasizes the growing trend to move away from a strict property interpretation of animals under the law.

Advocates at the Animal League Defense Fund (“ALDF”) submitted amicus curiae briefs in these significant Oregon cases (*Newcomb* and *Fessenden/Dicke*).<sup>166</sup> The ALDF is a nationwide nonprofit organization of attorneys specializing in animal protection.<sup>167</sup> The ALDF, as advocated for in their numerous briefs, hopes courts will go one-step further, by also creating an established emergency aid exception under Article I, section 9 or under the Fourth Amendment in these types of animal welfare cases.<sup>168</sup>

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161. See ALASKA STAT. § 25.24.160(a)(5) (2017) (guiding court decisions in divorce cases by basing custody on the best interests of the animal); OR. REV. STAT. § 167.305(2) (2017); *Fessenden*, 333 P.3d at 286; cf. Krimmer, *supra* note 12 (suggesting a Wisconsin pet custody statute closely modeled on Alaska’s law); *California Court of Appeals Says Pets Are More than Inanimate Property*, *supra* note 12 (discussing the California Second District Court of Appeals ruling that allows for reasonable recovery of necessary costs for wrongfully injured animals); “*Goddard’s Law*” *Passes Ohio House*, *supra* note 12 (discussing now-enacted “Goddard’s Law,” which elevates penalties for animal abuse to felonies).

162. *Fessenden*, 333 P.3d at 286 (Or. 2014).

163. See Green, *supra* note 14.

164. OR. REV. STAT. ANN. § 609.020 (2009); *Newcomb*, 375 P.3d at 440.

165. OR. REV. STAT. ANN. § 167.310 (2017); *Newcomb*, 375 P.3d at 441–42.

166. Brief of Amicus Curiae, *State v. Fessenden*, 333 P.3d 278 (Or. 2014) (Nos. S061740, S061770), 2014 WL 1571694; Brief of Amicus Curiae, *State v. Newcomb*, 375 P.3d 434 (Or. 2016) (No. S062387), 2014 WL 5910792.

167. Brief of Amicus Curiae at 1, *State v. Fessenden*, 333 P.3d 278 (Or. 2014) (Nos. S061740, S061770), 2014 WL 1571694 at \*1.

168. Arin Greenwood, *Oregon Court Says Animals Can Be Crime ‘Victims,’ Like People. So What Does That Mean?*, HUFFINGTON POST (Sept. 26, 2014, 11:12 AM), [https://www.huffingtonpost.com/2014/09/26/oregon-court-animals-victims\\_n\\_5883588.html](https://www.huffingtonpost.com/2014/09/26/oregon-court-animals-victims_n_5883588.html).

Even though the *Newcomb* case is the first in Oregon to clearly state dogs are not “mere property,” the idea behind the decision is far from original.<sup>169</sup> Various states including California, Ohio, Alaska, and Wisconsin either have already, or are in the process of, making the same determination as Oregon, whether through their judicial or legislative processes.<sup>170</sup>

### California

In 2012, the California Court of Appeals decided a set of consolidated cases in *Martinez v. Robledo*.<sup>171</sup> The two cases dealt with separate instances where pets had been wrongfully harmed, and the parties were seeking to recover damages.<sup>172</sup> Previously, owners in this situation could recover only the fair market value of the animal, much like any other personal property damage, like to a sofa.<sup>173</sup> Nevertheless, California’s Second District Court of Appeal held that the owner of a wrongfully injured pet may recover “the reasonable and necessary costs” of treating and caring for an injured animal.<sup>174</sup> It encapsulated the idea that every animal is unique and that a majority of people would go to great lengths to care and provide for their animals.<sup>175</sup> Similar to Oregon statutes, California statutes have long recognized that: “Animals are special, sentient beings, because unlike

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169. *Newcomb*, 375 P.3d at 434, 440.

170. See ALASKA STAT. § 25.24.160(a)(5) (2017) (guiding court decisions in divorce cases by basing custody on the best interests of the animal); OR. REV. STAT. § 167.305(2) (2017); *Fessenden*, 333 P.3d at 286; cf. Krimmer, *supra* note 12 (suggesting a Wisconsin pet custody statute closely modeled on Alaska’s law); *California Court of Appeals Says Pets Are More than Inanimate Property*, *supra* note 12 (discussing the California Second District Court of Appeals ruling that allows for reasonable recovery of necessary costs for wrongfully injured animals); “*Goddard’s Law*” *Passes Ohio House*, *supra* note 12 (discussing now-enacted “Goddard’s Law,” which elevates penalties for animal abuse to felonies).

171. 147 Cal. Rptr. 3d 921 (Ct. App. 2012).

172. *Id.* at 922–23. The parties and facts of the two consolidated cases were unrelated. In the first case, the Martinez’s dog Gunner, who was a two-year-old German Shepherd, got loose in a neighbor’s yard. The families were not on good terms, and the neighbor, Enrique Robledo, shot Gunner, resulting in the amputation of his right rear leg. The Martinez family sought recovery of veterinarian bills and punitive damages under negligence and conversion doctrines. In the second case, owner Margaret Workman took her nine-year-old Golden Retriever, Katie, to a small animal hospital for surgery. During the surgery, Dr. Klause nicked and cut Katie’s intestine causing internal bleeding and left a piece of surgical gauze inside her body and did not tell Workman what happened. When Katie became increasingly more sick, Workman took her for emergency surgery to correct the problems and remove the gauze. Workman sued Dr. Klause for negligence and unfair business practices.

173. *Id.* at 924.

174. *Id.* at 927.

175. *Id.* at 926.

other forms of property, animals feel pain, suffer, and die.”<sup>176</sup> Although the California statutes focus on remedies for wrongful injury or death—a more tort-based claim—and the Oregon statute focuses more on a Fourth Amendment claim, both seem to arrive at the same conclusion: animals are sentient beings and therefore require more under the law than other forms of personal property.<sup>177</sup>

### *Ohio*

In 2016, Ohio passed new legislation known as “Goddard’s Law.”<sup>178</sup> Named after Dick Goddard, the longtime Ohio weather personality and animal protection activist, House Bill 60 made it a fifth-degree felony to “knowingly cause serious physical harm to a companion animal.”<sup>179</sup>

Included in this is the infliction of ongoing pain and suffering, food and water deprivation, or any activity that involves a substantial risk of death or incapacity of the animal.<sup>180</sup> The punishment includes mandatory jail time, as well as a considerable fine.<sup>181</sup> Though Goddard’s Law made huge steps forward in animal protection, it only covers those cases where a person *knowingly* causes harm, reserving its use for only “the most egregious animal cruelty offenders.”<sup>182</sup>

Ohio’s Goddard’s Law and Oregon’s welfare statutes involve substantially similar “minimum care” standards.<sup>183</sup> Oregon requires owners to provide minimum care such as food and water, whereas Ohio makes it a felony to knowingly cause harm through the

176. *Id.*

177. See *State v. Newcomb*, 375 P.3d 434 (Or. 2016); *Martinez*, 147 Cal. Rptr. 3d 921.

178. Darcie Loreno, *Goddard’s Law Goes into Effect Today in Ohio*, FOX 8 CLEVELAND (Sept. 13, 2016, 7:07 AM), <https://fox8.com/2016/09/13/goddards-law-goes-into-effect-today-in-ohio/>.

179. OHIO REV. CODE ANN. § 959.131(C) (West 2016); Jonathan Tressler, *2016 Legislation Gives State, Local Animal Protection Laws More Bite*, NEWS-HERALD (Jan. 2, 2017, 7:35 PM), <http://www.news-herald.com/general-news/20170102/2016-legislation-gives-state-local-animal-protection-laws-more-bite>.

180. OHIO REV. CODE ANN. § 959.131(E)(2); Penny Eims, *New Law in Ohio Makes Animal Cruelty a Felony*, SHELTERME.TV, <https://shelterme.tv/news/new-law-in-ohio-makes-animal-cruelty-a-felony/> (last visited Aug. 24, 2018).

181. OHIO REV. CODE ANN. § 959.99(E)(2); Eims, *supra* note 180.

182. Tressler, *supra* note 179. The application of the new law refers only to companion animals such as dogs and cats and does not extend to livestock. *Id.* It is also a common misunderstanding that Goddard’s Law applies to all animal cruelty cases and is therefore too harsh. In fact, it does not apply to every instance of neglect or cruelty, but rather, is reserved only for the most serious cases.

183. See OHIO REV. CODE ANN. § 959.131(E)(2); OR. REV. STAT. § 167.310(9) (2017).

deprivation of these items.<sup>184</sup> The Oregon welfare statute proactively encourages owners to provide such necessities, where in contrast, Goddard's Law seeks to deter the behavior by retroactively increasing punishment for those who fail to abide by its provisions.<sup>185</sup> Nevertheless, the goal of the Ohio, Oregon, and California statutes and judicial decisions endeavor to provide the same thing: greater protection under the law for animals.<sup>186</sup>

### *Alaska*

In a slight shift, yet still relevant to the discussion, Alaska revised a common divorce statute in early 2017 to consider the "well-being" of animals in divorce proceedings.<sup>187</sup> The provision is the first of its kind in the United States.<sup>188</sup> Divorce proceedings, similar to the other aforementioned types of cases, have historically viewed animals as property that become part of the "property distribution" when a couple gets divorced.<sup>189</sup> Similar to Ohio's Goddard's Law, Alaska's revised divorce statute applies to companion animals only and bases custodial decisions on what is best for the animal, not just the interests of its owners.<sup>190</sup> Existing legislation of this nature is typically reserved for children, although Alaska made clear that the new legislation would not put animals on par with humans.<sup>191</sup> However, this area of family law in Alaska elevates companion animals over the historical property interest, and acknowledges the same social trend noted in *Newcomb*: animals are increasingly regarded as part of the family.<sup>192</sup>

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184. OHIO REV. CODE ANN. § 959.99(E)(4); OR. REV. STAT. § 167.330.

185. OHIO REV. CODE ANN. § 959.99(E)(4); OR. REV. STAT. § 167.330.

186. See OHIO REV. CODE ANN. § 959.131; OR. REV. STAT. § 167.310(9); Martinez v. Robledo, 147 Cal. Rptr. 3d 921, 926–27 (Ct. App. 2012).

187. ALASKA STAT. § 25.24.160 (2017).

188. Debra Cassens Weiss, *Alaska Law Tells Divorce Judges to Consider Well-Being of Pets*, ABA J. (Jan. 31, 2017, 10:26 AM), [http://www.abajournal.com/news/article/alaska\\_law\\_tells\\_divorce\\_judges\\_to\\_consider\\_well\\_being\\_of\\_pets](http://www.abajournal.com/news/article/alaska_law_tells_divorce_judges_to_consider_well_being_of_pets).

189. Karin Brulliard, *In a First, Alaska Divorce Courts Will Now Treat Pets More Like Children*, WASH. POST (Jan. 24, 2017), [https://www.washingtonpost.com/news/animalia/wp/2017/01/24/in-a-first-alaska-divorce-courts-will-now-treat-pets-more-like-children/?utm\\_term=.63e6ceffdbb3](https://www.washingtonpost.com/news/animalia/wp/2017/01/24/in-a-first-alaska-divorce-courts-will-now-treat-pets-more-like-children/?utm_term=.63e6ceffdbb3); see also *Marital Property*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining marital property as "property that is acquired during marriage and that is subject to distribution or division at the time of marital dissolution" and the rough equivalent to community property).

190. Brulliard, *supra* note 189.

191. See ALASKA STAT. § 18.65.590 (defining "pet" as "a vertebrate living creature maintained for companionship or pleasure").

192. See Brulliard, *supra* note 189.

This new legislation is “groundbreaking” and “unique,” and is projected to evolve in states nationwide.<sup>193</sup> Once again, the similarities are consistent and notable here. Legislators are recognizing the continued personal property application of the law to animals to be inadequate due to animals’ sentient nature.<sup>194</sup> With this in mind, the law differentiates between companion animals and other divisions of personal property in divorce proceedings but does not propose to elevate them to the same level as humans.<sup>195</sup>

### *Wisconsin*

Following Alaska’s example, Wisconsin proposed a bill in late 2017 outlining how courts should handle pet custody battles in divorce cases.<sup>196</sup> While acknowledging the traditional approach of treating animals the same as other items of personal property,<sup>197</sup> legislators also recognized that some items of personal property may hold sentimental value such as antiques passed down through generations, etc.<sup>198</sup> But as one Wisconsin lawmaker firmly stated: “a dog is not a desk.”<sup>199</sup>

Under the traditional property view, the individual who can establish ownership of the animal would retain custody of it.<sup>200</sup> This Wisconsin bill proposes to allow “couples [to] specify, among other things, visitation rights and the right to move the animal out of state.”<sup>201</sup> Once again, the legislation captures the increasing value of animals as family members, noting that the value far surpasses any other form of tangible personal property.<sup>202</sup>

The analysis of these states’ progressive legislation and the judicial decisions over the last few years, from neglect and abuse cases to divorce proceedings, provide a small glimpse at the overwhelming trend to move to higher protection for the well-being of animals. The

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193. *Id.*

194. See Suzanne Monyak, *When the Law Recognizes Animals as People*, NEW REPUBLIC (Feb. 2, 2018), <https://newrepublic.com/article/146870/law-recognizes-animals-people>.

195. Brulliard, *supra* note 189; Weiss, *supra* note 188.

196. P.J. Huffstutter, *Wisconsin Bill Outlines Rules for Pet Custody*, SEATTLE TIMES (July 15, 2007, 2:03 AM), <https://www.seattletimes.com/nation-world/wisconsin-bill-outlines-rules-for-pet-custody/>.

197. *Id.*

198. *Id.*

199. *Id.* (quoting Senator Carol Roessler, co-author of the bill).

200. *Id.*

201. *Id.*

202. *Id.*

*Newcomb* court falls in line with this trend. As the court stated, “we do not need a mirror to the past or a telescope to the future to recognize the legal status of animals has changed and is changing still.”<sup>203</sup>

## VI. CONCLUSION

The development of animal rights and protections began in 1641 in the United States and continues to evolve over time.<sup>204</sup> The substantial conclusion by the court in *Newcomb* continues to propel the matter forward, as numerous states across the country have also begun looking at harsher punishments for neglect and abuse, remedies for wrongful injury to animals, and the general best interests of animals.<sup>205</sup> It is clear given these facts, that as time progresses more protections for the well-being of animals are in the works. The *Newcomb* court carefully pointed out that they did not place animals on par with humans.<sup>206</sup> Nevertheless, the court acknowledged the analogy used by the trial court that the case closely resembled “the medical examination and diagnostic analysis of a child taken into protective custody on suspicion of abuse.”<sup>207</sup> This significantly elevates animals from the position of property such as suitcases and recognizes their sentient nature.<sup>208</sup> When mistreated, animals experience feelings of pain, stress, and fear.<sup>209</sup> Much like a child, animals are unable to seek help or speak for themselves, warranting higher protections under the law.<sup>210</sup> This evolving legal standard of

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203. State v. Newcomb, 375 P.3d 434, 444 (Or. 2016).

204. Janet M. Davis, *The History of Animal Protection in the United States*, ORG. AM. HISTORIANS (Nov. 2015), <http://tah.oah.org/november-2015/the-history-of-animal-protection-in-the-united-states/>.

205. See ALASKA STAT. § 25.24.160(a)(5) (2017) (guiding court decisions in divorce cases by basing custody on the best interests of the animal); OR. REV. STAT. § 167.305(2) (2017); State v. Fessenden, 333 P.3d 278, 286 (Or. 2014); cf. Krimmer, *supra* note 12, (suggesting a Wisconsin pet custody statute closely modeled on Alaska’s law); *California Court of Appeals Says Pets Are More than Inanimate Property*, *supra* note 12 (discussing the California Second District Court of Appeals ruling that allows for reasonable recovery of necessary costs for wrongfully injured animals); “Goddard’s Law” Passes Ohio House, *supra* note 12 (discussing now-enacted “Goddard’s Law,” which elevates penalties for animal abuse to felonies).

206. *Newcomb*, 375 P.3d at 441.

207. *Id.* at 438.

208. See Green, *supra* note 14.

209. *Id.*

210. *Id.*

animals as “mere property,” as evaluated in *Newcomb* remains one of the top animal rights issues in the United States.<sup>211</sup>

The court’s decision in *Newcomb* encompasses the growing social norm that many consider their animals as part of the family.<sup>212</sup> As the *Newcomb* court stated: “A person can be as cruel or abusive as she wants to her own stereo or folder and can neglect the maintenance of a car to the point it will not operate, without legal consequence. The same is not true of an animal that a person owns or has custody over.”<sup>213</sup> Further, “some animals, such as pets, occupy a unique position in people’s hearts and in the law, one that is not well-reflected in the ‘cold characterization’ of a dog as ‘mere property.’”<sup>214</sup>



Photo of “Juno,” during his recovery, courtesy of the Oregon Humane Society<sup>215</sup>

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211. See Doris Lin, *The Top 11 Animal Rights Issues*, THOUGHTCO. (Oct. 9, 2017), <https://www.thoughtco.com/top-animal-rights-issues-127632> (ranking the property status of animals as number two of eleven on the top considerations of animal rights issues).

212. See Brulliard, *supra* note 189.

213. State v. Newcomb, 375 P.3d 434, 441 n.11 (Or. 2016).

214. *Id.* at 440 (quoting State v. Fessenden, 333 P.3d 278, 284 (Or. 2014)); Rabideau v. City of Racine, 627 N.W.2d 795, 798 (Wis. 2001) (“Labeling a dog ‘property’ fails to describe the value human beings place upon the companionship that they enjoy with a dog.”).

215. *Supreme Court Victory for Pets*, OR. HUMANE SOC’Y (June 17, 2016), <https://www.oregonhumane.org/supreme-court-victory-pets/>.



